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No. 01-120

Supreme Court of the United States

COALITION OF NEW JERSEY SPORTSMEN, INC., *et al.*,

Petitioners,

v.

DONALD T. DIFRANCESCO, ACTING GOVERNOR, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's standard summary judgment and abstention rulings in this pre-enforcement, multi-pronged challenge to the constitutionality of New Jersey's long-standing regulation of assault firearms (*N.J. Stat. Ann.* 2C:39-1 *et seq.* (West 1990)).

PARTIES TO THE PROCEEDING

In addition to the petitioner identified in the caption, petitioners include Bob's Little Sportshop, Inc.; Springfield, Inc.; Armalite, Inc.; Robert L. Viden, Jr.; Stephen D. McClure; and John Does I, II, III, IV, V, VI, VII, VIII and IX.

In addition to the respondent identified in the caption, respondents include John J. Farmer, Jr., Attorney General, State of New Jersey; Andrew N. Yurick, II, Prosecutor of Gloucester County, New Jersey; Patricia Kunchynski, Chief of Glassboro, New Jersey Police Department; and Carson J. Dunbar, Colonel, Division of State Police of New Jersey.

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OPINIONS BELOW

Respondents (hereinafter the State) concur with the statements set forth in the petition.

JURISDICTION

The State concurs with the statements set forth in the petition, with the clarification that the Court of Appeals for the Third Circuit also affirmed the district court's order denying summary judgment to petitioners (hereinafter the Coalition). (App. 4, 13, 65).[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The State concurs with the statements set forth in the petition, with the clarification that also involved are *N.J. Stat. Ann.* 2C:58-5 and 13 (West 1990). (Supp. App.1-4).

STATEMENT OF THE CASE

This case involves a more than decade-old state statute of limited application regulating the possession of a very narrow group of specific weapons. The state supreme court has never analyzed the statute, much less rendered an authoritative construction of it. The district court, in a thorough opinion, carefully applied settled constitutional law in deciding that the State, not the Coalition, was entitled to summary judgment in this declaratory judgment action attacking New Jersey's 1990 Assault Firearms Act

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[1] "Pet." refers to the petition for writ of *certiorari*.
"App." refers to the appendix to the petition for writ of *certiorari*.
"Cir. App." refers to the appendix in the Third Circuit.
"Supp. App." refers to the supplemental appendix to this brief in opposition.

(hereinafter the Act) . The Court of Appeals for the Third Circuit agreed with this resolution.

Historically, the state legislature back in May 1990 passed a bill controlling the possession, sale, and transport of assault firearms and large capacity ammunition magazines. L.1990, c. 32; (App. 13). In seeking the law's passage, then-Attorney General Robert Del Tufo testified before the New Jersey Senate Judiciary Committee and acknowledged that the Act's intent did not touch upon any firearms used for legitimate hunting or target shooting purposes. (App. 14; Cir. App. 263-265). The Act amended and strengthened New Jersey's existing gun control laws, and was adopted to tackle the deadly crimes committed with assault firearms, the often-stolen "weapons of choice" for drug traffickers, violent offenders, and members of organized crime. (App. 49; Cir. App. 330, 334, 361-362, 642-646). Indeed, the federal government thereafter permanently banned import of 58 types of assault weapons into this country, and itself outlaws such weapons. 18 *U.S.C.* 921 (a)(30) and 922 (v) (1998); John M. Brody, *Clinton to Impose Ban on 58 Types of Imported Guns,* N.Y. Times, April 6, 1998, at A17.

Turning to the Act's unique statutory scheme, a gun may only be classified as an assault firearm in a limited number of ways. *N.J. Stat. Ann.* 2C:39-1w (West 1990); (App. 14-15; Cir. App. 170-172, 327, 483-484). The Act, too, applies only to semiautomatic, not traditional hunting, weapons. Guns requiring manual operation between shots, such as pump actions, bolt actions, lever actions, slide actions, or single shots, are entirely excluded, as are most semiautomatic rifles and shotguns. *N.J. Stat. Ann.* 2C:39-1w and 1x (West 1990); (App. 14). The Coalition incorrectly complains in its "Questions Presented" that the Act in part defines assault firearms "by 66 model names by specified manufacturers . . .," (Pet. i), whereas in truth several of the definitions specify no manufacturer whatsoever. *N.J. Stat. Ann.* 2C:39-1w(1) ("[a]ny shotgun with a revolving cylinder such as the

'Street Sweeper' or 'Striker 12'"; "Avtomat Kalashnikov type semi-automatic firearms"), 3, 4, and 5 (West 1990); (App. 29-30).

Possessing an assault firearm is prohibited in New Jersey unless it is among those listed by the Attorney General as legitimate for target shooting and its owner registered it, or obtained a license for it, or permanently rendered it inoperable. *N.J. Stat. Ann.* 2C:39-1y, 3, 5f, and 9g (West 1990); *N.J. Stat. Ann.* 2C:58-5, 12, and 13 (West 1990); (App. 15-16; Supp. App. 1-4).[2] A one-year grace period existed for those lawfully owning assault firearms as of the Act's May 30, 1990, effective date to either register them, transfer them, render them inoperable, or surrender them to the police. *N.J. Stat. Ann.* 2C:39-12 (West 1979); *N.J. Stat. Ann.* 2C:58-12b and 13 (West 1990); (App. 16; Supp. App. 3-4; Cir. App. 326-329). Assault firearms owners subsequently registered nearly 1,000 operable firearms, certified more than 900 as inoperable, and surrendered another 26 to the police. (Cir. App. 509-510, 512, 520, 523, 532).

More than six years after the state legislature enacted the assault firearms law, the Coalition decided to file a pre-enforcement declaratory judgment action in federal, rather than state, court challenging its constitutionality on a myriad of bases. (App. 12-13, 17; Cir. App. 3, 5, 61-100). In July 1998 both the State and the Coalition moved for summary judgment, and on March 31, 1999, the Honorable Joseph H. Rodriguez, U.S.D.J., granted the State's motion and denied the Coalition's. *Coalition of New Jersey Sportsmen, Inc. v. Whitman,* 44 F. Supp. 2d 666 (D.N.J. 1999); (App. 4, 8,

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[2] The Coalition incorrectly contends that knowing possession of a large capacity ammunition magazine is punishable by 18 months' imprisonment. (Pet. 3 n.3). Rather, it is punishable by a term not exceeding 18 months. *N.J. Stat. Ann.* 2C:39-3j and 2C:43-6a(4) (West 1990).

12-65; Civ. App. 8, 10-60, 136-139). In addressing the Coalition's numerous complaints about the Act's viability, the district court set forth the well-settled standard of review in deciding summary judgment motions. It then denied the State's general abstention request, and, based on the applicable legal precepts, rejected the Coalition's facial vagueness, equal protection, freedom of association, freedom of speech, and bill of attainder challenges. (App. 18-41, 46-65).

While also deciding that the Act was not vague as applied to certain situations, (App. 24-41), the district judge left for resolution on a case-by-case basis in the state courts many unsettled issues of state law, if the Coalition wished to pursue them there. These issues, "fraught with speculation," involved pre-enforcement "as applied" vagueness challenges to what was a facially valid law. (App. 41-46) (citing *Harman v. Forssenius*, 380 U.S. 528, 534 (1965), and *Poe v. Ullman*, 367 U.S. 497, 526 (1961) (Harlan, J., dissenting)).

The Coalition thereafter appealed this decision to the United States Court of Appeals for the Third Circuit in April 1999. The court subsequently dismissed the appeal. It, however, allowed the Coalition to reinstate the appeal in September 2000. (Cir. App. 1-2, 9).

In a memorandum opinion filed March 21, 2000, the court of appeals substantially agreed with the district court's analysis, reasoning, and conclusions, and addressed in that opinion several of the issues the Coalition had raised. (App. 1-8); *Coalition of New Jersey Sportsmen, Inc. v. Whitman*, 263 F.3d 157 (3d Cir. 2001). It agreed that the district court had applied the appropriate standard in evaluating the facial vagueness claims. (App. 4-5). It agreed that the district court had properly applied that standard to the Act's definitions of assault firearms. (App. 5-7). And it agreed that the district court had applied the proper standard in deciding the free speech claims. (App. 7). The Court of

Appeals for the Third Circuit therefore affirmed the district court's summary judgment decisions. (App. 4, 8). On April 26, 2001, the court of appeals denied the Coalition's petitions for rehearing and for rehearing *en banc*. (App. 9-11).

REASONS FOR DENYING THE PETITION

In this case the court of appeals afforded plenary review to the district court's detailed summary judgment and abstention decisions, examined the record created and the arguments made, and logically and properly determined that the Coalition's pre-enforcement facial attack upon New Jersey's assault firearms law was entirely unavailing. Thus the State was entitled to summary judgment even absent an evidentiary hearing, as the district judge had ruled. In this case the Coalition asks for nothing more than a reaffirmation of well-settled existing law, and no compelling reasons exist to grant the petition for a writ of *certiorari*. *Sup. Ct. R.* 10.

Involved here are multiple challenges to a narrow state law of limited application, which is not duplicated in either the federal or other statutory schemes regulating assault firearms. Indeed, the Act applies only to a small subclass of firearms that New Jersey was compelled to regulate to protect the public, and leaves alone guns used for legitimate target shooting or hunting purposes. The Coalition chose to bypass seeking a definitive interpretation of the Act in state court, and instead asks this Supreme Court to decide the constitutionality of a state statute that the state supreme court has never construed. *Contra City of Chicago v. Morales*, 527 U.S. 41, 61 (1999). This bypass caused the district court to abstain from deciding many "as applied" vagueness complaints because they involved unsettled areas of state law. (App. 44-46).

Additionally, as the State explained to the district court and court of appeals, the Coalition criticizes the Act for banning weapons specifically listed, those identical to them,

and those generically described. Apparently the Coalition believes that assault firearms cannot be regulated under any circumstances.[3] But this is not true.

POINT I
THE ACT IS NOT VAGUE.

Initially, the Act is not unconstitutionally vague. (Pet. 4-5, 6-19). Both courts faced with this issue below agreed with this conclusion, and with the legal road traveled to it. (App. 4-7, 24-46). Both agreed that the pre-enforcement facial vagueness challenge was to be measured by this Court's standard set forth in *Village of Hoffman Estates, Inc. v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), which, too, addressed a pre-enforcement facial challenge to a law. In that case, this Court acknowledged that "[i]n a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Id.* at 491-92, 494.

The courts in this case dutifully adopted this very analysis. As the district court explained, the Act did not touch upon significant constitutionally protected conduct. (App. 24-28). This was because

> [a]lthough the complaint seeks to invalidate portions of the law which require membership in gun clubs based on the First Amendment's freedom of association, the void for vagueness arguments center on

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[3] As one legislator has remarked, "[i]f we restrict the list, we're damned because of the guns we left out. If we expand the list, we're damned for the guns we keep in." *Benjamin v. Bailey*, 662 A.2d 1226, 1239 n.12 (Conn. 1995).

> multiple phrases in the law which do not implicate constitutionally protected conduct. In other words, the alleged vagueness of the law is attacked in a pre-enforcement review action based on due process, not, as in many cases, the First Amendment, which would heighten judicial scrutiny.

(App. 28).

Therefore the proper level of scrutiny applied to those portions of the Act the Coalition challenged as facially vague was, as both courts agreed, whether the law was impermissibly vague in all of its applications and did not provide minimally fair notice of what it prohibited. (App. 4, 28-29); *see Village of Hoffman Estates, Inc. v. Flipside, Hoffman Estates, Inc.*, 455 U.S. at 494-97; *Steffel v. Thompson*, 415 U.S. 452, 474 (1974); *National Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 293 (6th Cir. 1997); *Navegar, Inc. v. United States*, 103 F.3d 994, 1001 (D.C. Cir. 1997); *Richmond Boro Gun Club, Inc. v. New York*, 896 F. Supp. 276, 289 (E.D.N.Y. 1995), *aff'd*, 97 F.3d 681, 684 (2d Cir. 1996). The logic and reasonableness of the conclusions reached by the district court and Third Circuit dictated that those decisions of this Court calling for a more rigid vagueness standard for statutes implicating a substantial amount of constitutionally protected conduct were not the proper vehicles by which to decide this facial challenge. (App. 4, 28 n.14) (citing *City of Chicago v. Morales*, *supra*, and *Kolender v. Lawson*, 461 *U.S.* 352 (1983)); *contra* Pet. 6-14.

Nor is the Coalition correct in its claim that a perceived lack of scienter in a portion of the Act, and its concomitant effect on the vagueness analysis, was a matter that eluded both courts. (Pet. 6-19). Rather, each squarely addressed this issue.

The district court understood, in analyzing the Coalition's numerous "as applied" vagueness claims, that this Court in *Hoffman Estates* had set forth "a relatively strict" vagueness test for criminal statutes. (App. 41-42). However, while the Act was criminal in nature, the concern for constitutionally protected rights was "notably absent . . . ." (App. 42). And while a portion of the Act on its face did not require a level of scienter, which was but one factor to consider, the Attorney General had issued several directives and guidelines to law enforcement officials regarding the Act's reach; one in 1996 required an element of scienter at least as to "substantially identical"[4] assault firearms.[5] (App. 42-44; Cir. App. 170-172, 291, 326-329, 514, 524-525, 528-529, 544, 548, 556, 560, 565, 570, 575, 580); *see Village of Hoffman Estates, Inc. v. Flipside, Hoffman Estates, Inc.*, 455 U.S. at 494, 498-99.

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[4] The Coalition's reliance on two unpublished state court decisions, which lack any precedential value, *N.J. Ct. R.* 1:36-3, does not aid its cause. (Pet. 18, 18 n.20). As the State explained to the district court and court of appeals, *State v. Merrill* (Cir. App. 287-290) and *State v. Tanis*, No. A-5335-95T4 (N.J. Super. Ct. App. Div. Aug. 24, 1998) (Cir. App. 312-325), involved as applied, not facial, vagueness decisions as to "substantially identical" assault firearms. After *Merrill* the Attorney General issued relevant guidelines regarding "substantially identical" guns. (App. 6, 36, 43). Also, the district court here refrained from deciding many unsettled "as applied" issues of state law. (App. 41-46).

[5] Errors exist in the substantive text of the Coalition's appendix. Relative to the 1996 directive, the district court determined that the Attorney General had written that proof was required that a "'defendant knows that the firearm is "substantially identical" to one of the named assault weapons.' (Defendant's Exh. B, p. 3). In sum, the Attorney General seemingly claims . . .," not that "'defendant knows that the firearm is "substantially identical" to one Attorney General seemingly claims . . . .'" (App. 43); *Coalition of New Jersey Sportsmen, Inc. v. Whitman*, 44 F. Supp. 2d at 683. Also, *compare* App. 7 *with* court of appeals memorandum opinion at 7.

These unsettled areas of state law, and additional circumstances, gave the district court pause. It thus abstained from ruling on the many "as applied" challenges to what was a facially valid Act because "[l]imiting constructions of the law may render moot what would otherwise be broad pronouncements of state law based on federal constitutional questions," understanding that the Coalition was free to seek declaratory judgment in state court. (App. 44-46); *N.J. Stat. Ann.* 2A:16-50 to 62 (West 1924). Therefore it left for the state courts the quagmire of unresolved "as-applied" claims. *See Peoples Rights Org., Inc. v. Columbus*, 152 F.3d 522, 539-40 (6th Cir. 1998) (Merritt, J., dissenting) ("I would wait and see how the law is applied and not try to answer a host of hypothetical questions in a long opinion in a declaratory judgment case. I would wait for a real case.")

The Third Circuit, while not specifically addressing in its opinion the district court's restraint in this particular area, agreed that whether a statute prohibited or constrained constitutionally protected conduct, not whether the law was criminal or civil, was the proper standard for analysis. (App. 5). Applying that standard here meant that the Act had to be impermissibly vague in all its applications, a standard that the district court had correctly applied in rejecting the Coalition's facial vagueness claims. (App. 5-7); *contra* Pet. 6-14.

The Coalition also overstates an alleged "split" between courts of appeals in addressing facial vagueness standards. (Pet. 4-6, 15-16). Initially, the State admits that both the district court and Third Circuit declined to follow the Sixth Circuit's analysis of a facial vagueness challenge to a city's assault weapons ban. (App. 5, 39-40). But these courts were not analyzing a particular federal statute, or even similarly worded state laws. *National Rifle Assoc. of Am. v. Magaw,* 132 F.3d at 292. Rather, the Third Circuit was interpreting a New Jersey state statute worded one way and the Sixth Circuit twice interpreted Columbus city ordinances worded quite another. (App. 12-13); *Peoples Rights Org., Inc. v.*

Columbus, 152 F.3d at 525; *Springfield Armory, Inc. v. Columbus,* 29 F.3d 250, 251 (6th Cir. 1994). Of course courts will necessarily differ in interpreting the many laws the many states and municipalities adopt in regulating firearms.

For example, the Sixth Circuit was faced with an ordinance that prohibited named assault weapons and similar guns, but only those similar ones made by the same manufacturer. *Id.* Here the Third Circuit addressed New Jersey's Act, which regulates possession of certain named assault firearms, and any others described in the statute without regard to manufacturer. *N.J. Stat. Ann.* 2C:39-1w (West 1990). And the Ohio ordinance included an invalid "grandfather" clause and was not subject to any type of clarifying interpretation, contrary to the Act. (App. 6, 36, 42-44); *Peoples Rights Org., Inc. v. Columbus,* 152 F.3d at 530-32; *see Village of Hoffman Estates, Inc. v. Flipside, Hoffman Estates, Inc.*, 455 U.S. at 494. Lastly, the Sixth Circuit addressed an ordinance the city modified to specifically eliminate a scienter requirement, quite unlike the relevant statute here. (App. 5, 42-44; Cir. App. 170-172, 291, 326-329); *N.J. Stat. Ann.* 2C:39-5f (West 1990) ("[a]ny person who knowingly has in his possession an assault firearm is guilty of a crime . . ."); *Peoples Rights Org., Inc. v. Columbus*, 152 F.3d at 534; *see State v. Pelleteri*, 294 N.J. Super. 330, 334-35, 683 A.2d 555, 557-58 (App. Div. 1996), *certif. denied*, 148 N.J. 461, 690 A.2d 609 (1997). Therefore no true "split" exists, and compelling differences arise between the cases the respective courts of appeals decided that help explain their approaches. *Contra* Pet. 4-5, 15-16. One cannot forget, either, that the impact of any conflict is narrowly confined and not of a recurring nature.

Beyond these differences, the district court here reasoned that the Sixth Circuit's heightened standard of review did not apply to the Coalition's facial vagueness challenge to a narrow portion of the Act, section 1w(5), which dealt with "a part or combination of parts" that would constitute an assault

firearm. This was particularly so because the Act had a core meaning and neither reached significant constitutionally protected conduct nor gave unfettered discretion to law enforcement officials. (App. 4-5, 39-40); *see Richmond Boro Gun Club, Inc. v. New York*, 97 F.3d at 684-86; *Vandergriff v. Chattanooga*, 44 F. Supp. 2d 927, 936-37 (E.D. Tenn. 1998), *aff'd*, 182 F.3d 918 (6th Cir. 1999); *Kasler v. Lockyer*, 2 P.3d 581, 592 (Cal. 2000), *cert. denied*, ___ U.S. ___, 121 S. Ct. 1090 (2001); *contra City of Chicago v. Morales*, 527 U.S. at 55, 55 n.22, 60-61 (plurality); *Forbes v. Napolitano*, 236 F.3d 1009, 1011 (9th Cir. 2000), *amended and superseded by* 247 F.3d 903, *amended by* 260 F.3d 1159 (9th Cir. 2001).

For these reasons, the Act is not vague. Involved here is a unique law with very limited reach that the state supreme court has never interpreted, and the proper application of this Court's relevant decisions. Also present in the case are numerous unsettled areas of state law, which caused the courts below to refrain from deciding them and left the Coalition free to pursue the matters in state court. Finally, the Coalition overstates the alleged conflict between the circuits on the vagueness standard used to evaluate differing state assault weapons statutes in pre-enforcement facial attacks; indeed, no true conflict exists. Because the decisions of the district court and court of appeals were consistent with this Court's standards for addressing alleged vagueness, the petition for a writ of *certiorari* should be denied.

POINT II

THE ACT DOES NOT VIOLATE FREE SPEECH OR EQUAL PROTECTION OF THE LAW.

The Coalition next complains that the Act's "name ban" violates gun manufacturers' free speech and equal protection rights. (Pet. 5, 19-24). Essentially, it parrots the argument

made before the district court and court of appeals that the Act censors particular gun manufacturers from using certain names for their weapons. The decisions below, however, are harmonious with this Court's relevant decisions, and present no important, unresolved question of federal law that this Court must settle. *Sup. Ct. R.* 10(c); *contra* Pet. 5.

The Act logically defines certain assault firearms by name, defines others as those made by any manufacturer under any designation that is substantially identical to any firearm in section 1w(1), defines described semiautomatic shotguns with certain magazine capacities or other features, defines described semiautomatic rifles with certain fixed magazine capacities, and defines a part or combination of parts that are prohibited. *N.J. Stat. Ann.* 2C:39-1w(1)-(5) (West 1990); (App. 14-15); *contra* Pet. 19-20. It bars no speech, and forbids no manufacturer from naming any gun in any manner it chooses. Rather, the state legislature, similar to Congress, validly determined that some specific, perhaps notorious guns had to be banned or strictly controlled via registration, licensing, or by being rendered inoperable. *See* 18 *U.S.C.* 921(a) (30) (A) and 922(v) (1998); (Cir. App. 344, 355, 361, 368-369).

The district court acknowledged that this was not a typical commercial free speech case because "the Act . . . does not prohibit or criminalize the naming itself." (App. 59-60). "Erring on the side of caution" despite the ability to remove the matter from the commercial free speech realm, Judge Rodriguez applied this Court's well-settled legal standards in analyzing such speech regulations. (App. 60); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 564 (1980). The judge concluded that the State had a substantial interest in regulating assault firearms, that the "fit" between the Act's ends and the means chosen to accomplish those ends was snug, and that the commercial speech restrictions, "which are minimal to begin with[,]" were properly tailored to achieve the State's goal. (App. 60-

62); *contra* Pet. 22. "Confined to words as we all are," the district court reasoned elsewhere in its opinion that "it is inconceivable that any legislator could list all prohibited weapons, given their sheer numerosity and the ever evolving development of new weapons, often based on old designs." (App. 35-36 (1998 Department of Treasury study found 39 models of semiautomatic rifles based on AK47 design alone), 62; Cir. App. 333).

Turning to the Coalition's equal protection argument, the district court properly applied a rational basis review because the Act burdened no fundamental constitutional right and targeted no suspect classification. The judge determined that the link between public safety and regulating assault firearms "is . . . obvious . . .," and held that the equal protection claim was without merit. (App. 46-52); *see Vacco v. Quill,* 521 U.S. 793, 798 (1997); *Romer v. Evans*, 517 U.S. 620, 631 (1996).

The Third Circuit agreed with the district court's free speech and equal protection analyses. (App. 4, 7). Involved here were not content-based restrictions on speech invoking strict scrutiny, but rather commercial speech that Judge Rodriguez had properly interpreted:

> The District Court correctly applied that test for commercial speech to the restriction at issue in holding that the statute was constitutional, that there was a reasonable fit between the use of specific named weapons and the governmental interest in banning assault weapons, and that the restriction on words was no more extensive than necessary to serve that interest.

(App. 7); *see Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 37 (1999); *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 623 (1995).

Obviously the New Jersey legislature, like Congress, could regulate a limited subset of weapons by name.

The Coalition wrongly claims that this Court's decision in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000), compels a strict scrutiny test. (Pet. 21-22). While acknowledging that one could argue that commercially expressing oneself in the illegal transaction of weapons banned from New Jersey is afforded no First Amendment protection at all, the district court nonetheless addressed the claim raised and, out of an abundance of caution inuring to the Coalition's benefit, subjected it, as did the court of appeals, to a commercial speech analysis. (App. 5, 58-62). In *Playboy*, a federal statute applied only to certain television channels and programmers primarily dedicated to sexually explicit adult programming, and to no others regardless of their programming content. *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. at 812-13. Under the Act, in stark contrast, both named assault firearms and any other substantially identical ones are prohibited regardless of manufacturer. This obviates the type of content-based problem this Court faced in *Playboy*. Simply put, New Jersey is not barring or restricting speech, but rather regulates particularly notorious or popular weapons in a commercial context. *See Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993); (Pet. 22).

Also unpersuasive is the Coalition's complaint that the Act violates equal protection. (Pet. 22-24). As explained, the Act does not "confine[] its prohibition to named manufacturers" such as Springfield and Armalite, *contra* Pet. 22-23, but also bans substantially identical and other assault firearms regardless of manufacturer. *N.J. Stat. Ann.* 2C: 39-1w(1)-(5) (West 1990). This cures the deficiency found in the

city ordinances in *Springfield Armory, Inc. v. Columbus*, 29 F.3d 250, 251-53 (6th Cir. 1994), and *Citizens for a Safer Community v. Rochester*, 627 N.Y.S. 2d 193, 197, 200, 203-04 (N.Y. Sup. Ct. 1994), which outlawed only named or certain manufacturers' guns and not similar or essentially identical ones. *Contra* Pet. 23-24.

For these reasons, the Act does not violate free speech or equal protection in regulating some assault firearms by name. The district court and Third Circuit correctly applied a commercial speech analysis to the Act, and found no free speech violation. That some gun manufacturers make weapons that the legislature chose to list by name, while their competitors are prohibited under another part of the Act from marketing identical or substantially identical firearms, generates no equal protection crisis. The decisions of the courts in this case are consistent with this Court's standards for addressing alleged free speech and equal protection claims, and no important questions of federal law demands intervention. The petition for a writ of *certiorari* should be denied.

POINT III

THE ACT DOES NOT VIOLATE FREEDOM OF ASSOCIATION OR EQUAL PROTECTION OF THE LAW.

In a last attempt to entice this Court to grant a writ of *certiorari*, the Coalition complains that the more than decade-old Act shortchanges Coalition members' freedom of association and equal protection rights. (Pet. 24-30). Again, the Coalition basically parrots the argument made before the courts below that requiring gun club membership to have registered certain assault firearms and to possess large capacity ammunition magazines, which the State could have outlawed altogether, is unconstitutional. The district court

and Third Circuit correctly rejected this complaint, too, and found the Act valid.

Any and all New Jersey owners of assault firearms legitimate for target shooting purposes purchased on or before May 1, 1990, had a full year from the Act's May 30, 1990, effective date to register them. One registration requirement was valid membership in a rifle or pistol club that existed before the effective date. *N.J. Stat. Ann.* 2C:58-12b (West 1990); (App. 52 n.24). Possessing large capacity ammunition magazines is illegal unless the individual has registered an assault firearm pursuant to section 12 and maintains and uses the magazine in connection with participation in competitive shooting matches that the Director of Civilian Marksmanship sanctions. *N.J. Stat. Ann.* 2C:39-3j (West 1990); (App. 52 n.25).

The Act thus validly required those wishing to register assault firearms legitimate for target shooting purposes, and to possess large capacity ammunition magazines for these guns that are used and maintained in connection with participation in certain sanctioned shooting matches, to be members of a rifle or pistol club before May 30, 1991. This statutory structure, which did not require club membership as of the time the Act was passed, offends neither freedom of association nor equal protection standards.

The district court, in dismissing the Coalition's complaint, correctly applied settled law to the Act's relevant sections. The court acknowledged that the right to freely associate had a corollary right not to associate. (App. 54); *see Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). It properly reasoned that rational basis review applied here because club membership burdened no fundamental right. (App. 54-58).

The district court found inapt the Coalition's reliance on another district court opinion to prop up its claim, explaining

that the Act required no arbitrary and irrational preference for those with a particular political, *i.e.*, National Rifle Association (hereinafter NRA), membership to receive a public benefit, which was "constitutionally significant." (App. 54-55); *Gavett v. Alexander*, 477 F. Supp. 1035 (D.D.C. 1979)[6]; *contra* Pet. 27. It logically held that the State had a legitimate interest in the ownership or reliance interests of assault firearms owners, and rationally linked retention of such weapons, unless licensed or rendered inoperable, with membership in clubs where they might properly be used; the State could have completely abrogated ownership of such dangerous weapons if it had so desired. (App. 55-56). And the district court correctly rejected the claim that the Act failed to satisfy the rational basis analysis, concluding that while the state legislature clearly intended the law to be broad enough to reach potentially deadly assault weapons, it was equally concerned with preserving the rights of those legitimately using them for shooting competitions. (App. 56-58; Cir. App. 264-265); *see Besig v. Dolphin Boating and Swimming Club*, 683 F.2d 1271, 1276 (9th Cir. 1982).

The district court also fully addressed, and rejected, the Coalition's equal protection attack on gun club membership. It determined that equal protection, which applies only to people, simply prevents lawmakers from treating differently those who are in all relevant respects alike. (App. 47-50). The lack of a suspect classification or of a burden to a fundamental right meant that the Act need only rationally relate to a legitimate state interest, and here the Coalition was not a suspect class and no fundamental right to weapon

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[6] Indeed, the district court in *Gavett* spelled out that federal governmental sales of guns at a reduced price may be premised on gun club membership and current competitive shooting activity so that those though to be willing and able to use them could do so. *Id.* at 1039-42, 1046. But now the window to register certain assault firearms has long since closed in New Jersey.

ownership existed. (App. 47-49); *Vacco v. Quill*, 521 U.S. 793, 799 (1997); *Heller v. Doe*, 509 U.S. 312, 319-21 (1993); *Kasler v. Lockyer*, 2 P.3d 581, 586 (Cal. 2000), *cert. denied*, ___ U.S. ___, 121 S. Ct. 1090 (2001). Thus, given the State's valid interest in regulating assault firearms and their great destructive power, the district court found no equal protection violation. (App. 47, 49; Cir. App. 332, 334, 361-362, 642, 646).

Faced with these claims on appeal, wherein the Coalition did not quarrel with the rational basis standard of review, the Third Circuit was in substantial agreement with the district judge's analysis, reasoning, and conclusions. It therefore affirmed without expanding on the district court's approach. (App. 4).

The Coalition is simply wrong in its position before this Court. Requiring owners of assault firearms deemed legitimate for target shooting purposes to prove, by a date certain, membership in an established rifle or pistol club logically relates to the valid purposes of ensuring that those with such destructive weapons, which otherwise would be illegal to possess if not licensed or rendered inoperable, have a valid reason to do so. The State could, if it wanted, simply bar any private possession of assault firearms as a valid exercise of its police powers, particularly given the dramatic increase in the use of such weapons in criminal activity. *See Gun South, Inc. v. Brady*, 877 F.2d 858, 863 (11th Cir. 1989). The Act involves no irrational, arbitrary classification based on land ownership where an individual had to produce two freeholder witnesses to purchase a deadly weapon, which courts understandably view skeptically, *Hetherton v. Sears, Roebuck & Co.*, 652 F.2d 1152, 1157-58 (3d Cir. 1981), nor does it involve a suspect or even a quasi-suspect class, *Galioto v. Department of the Treasury*, 602 F. Supp. 682, 686 (D.N.J. 1985), *vacated as moot*, 477 U.S. 556 (1986). *Contra* Pet. 29 n.27. The Act also did not condition ownership rights only on gun club membership as of the date

it became law. Rather, even non-club members had a year to join and register their assault firearms legitimate for target shooting purposes, or they could have licensed or rendered them inoperable. The window the state legislature created therefore was left open to all citizens without discrimination. *Contra Romer v. Evans*, 517 U.S. 620, 631-32 (1996); *Peoples Rights Org., Inc. v. Columbus*, 152 F.3d 522, 531-32 (6th Cir. 1998); Pet. 29.

The Coalition's final complaints -- that "many" gun clubs are private affiliates of the "highly political" NRA and that few gun club members are women -- ring hollow. (Pet. 25-27). The Coalition itself is an NRA formation, and each John Doe plaintiff is an NRA member. It cannot claim that all, or even most, clubs are NRA affiliates, nor does the Act require that gun clubs be private; in fact, many are open to public entities or use public facilities likely subject to anti-discrimination laws. And women, while comprising 4.6% of club members, own less than 1% of the registered assault firearms. (App. 53; Cir. App. 237, 546, 550, 553-558, 563, 568, 572, 577, 582, 596). The Coalition also presented no evidence whatsoever before the district court that "gun clubs engage in advocacy" simply because some may be NRA associates. *Contra* Pet. 26-27. It certainly cannot claim the shelter of a strict scrutiny analysis via a tortured "requirement of NRA membership" argument that is not true. *Contra* Pet. 29.

In sum, New Jersey's regulation of assault firearms violates no constitutional freedom of association or equal protection right. The district court and Third Circuit correctly analyzed these complaints under the applicable legal standards in the context of this pre-enforcement action, and found them to be without merit. This Court thus should deny the petition for a writ of *certiorari*.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the petition for a writ of *certiorari* be denied.

Respectfully submitted,

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Dated: October 17, 2001

SUPPLEMENTAL APPENDIX

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2C:58-5. **Licenses to possess and carry machine guns and assault firearms**

a. Any person who desires to purchase, possess and carry a machine gun or assault firearm in this State may apply for a license to do so by filing in the Superior Court in the county in which he resides, or conducts his business if a nonresident, a written application setting forth in detail his reasons for desiring such a license. The Superior Court shall refer the application to the county prosecutor for investigation and recommendation. A copy of the prosecutor's report, together with a copy of the notice of the hearing on the application, shall be served upon the superintendent and the chief police officer of every municipality in which the applicant intends to carry the machine gun or assault firearm, unless, for good cause shown, the court orders notice to be given wholly or in part by publication.

b. No license shall be issued to any person who would not qualify for a permit to carry a handgun under section 2C:58-4, and no license shall be issued unless the court finds that the public safety and welfare so require. Any person aggrieved by the decision of the court in granting or denying an application, including the applicant, the prosecutor, or any law enforcement officer entitled to notice under subsection a. who appeared in opposition to the application, may appeal said decision in accordance with law and the rules governing the courts of this State.

c. Upon the issuance of any license under this section, true copies of such license shall be filed with the superintendent and the chief police officer of the municipality where the licensee resides or has his place of business.

d. In issuing any license under this section, the court shall attach thereto such conditions and limitations as it deems to be in the public interest. Unless otherwise provided by court order at the time of issuance, each license shall expire one

year from the date of issuance, and may be renewed in the same manner and under the same conditions as apply to original applications.

e. Any license may be revoked by the Superior Court, after a hearing upon notice to the holder thereof, if the court finds that the holder is no longer qualified for the issuance of such a license or that revocation is necessary for the public safety and welfare. Any citizen may apply to the court for revocation of a license issued under this section.

f. A filing fee of $75.00 shall be required for each application filed pursuant to the provisions of this section. Of this filing fee, $25.00 shall be forwarded to the State Treasury for deposit in the account used by the Violent Crimes Compensation Board in satisfying claims and for related administrative costs pursuant to the provisions of the "Criminal Injuries Compensation Act of 1971," P.L. 1971, c. 317 (C.52:4B-1 et seq.).

g. Any license granted pursuant to the provisions of this section shall expire two years from the date of issuance and may be renewed in the same manner and under the same conditions as apply to original applications. If the holder of a license dies, the holder's heirs or estate shall have 90 days to dispose of that firearm as provided in section 12 of P.L. 1990, c. 32 (C. 2C:58-13).

h. If an assault firearm licensed pursuant to the provisions of this section is used in the commission of a crime, the holder of the license for that assault firearm shall be civilly liable for any damages resulting from that crime. The liability imposed by this subsection shall not apply if the assault firearm used in the commission of the crime was stolen and the license holder reported the theft of the firearm to law enforcement authorities within 24 hours of the license holder's knowledge of the theft.

i. Nothing in P.L. 1990 c. 32 (C. 2C:58-12 et al.) shall be construed to abridge any exemptions provided under N.J.S. 2C:39-6.

2C:58-13. **One year period to transfer, render inoperable, or surrender assault firearm in lieu of registration**

a. Any person who legally owns an assault firearm on the effective date of this act and who is unable to register or chooses not to register the firearm pursuant to section 11 of P.L.1990, c. 32 (C.2C:58-12) may retain possession of that firearm for a period not to exceed one year from the effective date of this act. During this time period, the owner of the assault firearm shall either:

(1) Transfer the assault firearm to any person or firm lawfully entitled to own or possess such firearm;

(2) Render the assault firearm inoperable; or

(3) Voluntarily surrender the assault firearm pursuant to the provisions of N.J.S. 2C:39-12.

b. If the owner of an assault firearm elects to render the firearm inoperable, the owner shall file a certification on a form prescribed by the Superintendent of the State Police indicating the date on which the firearm was rendered inoperable. This certification shall be filed with either the chief law enforcement officer of the municipality in which

the owner resides or, in the case of an owner who resides outside this
State but stores or possesses an assault firearm in this State, with the Superintendent of the State Police.

c. As used in this section, "inoperable" means that the firearm is altered in such a manner that it cannot be immediately fired and that the owner or possessor of the firearm does not possess or have control over the parts necessary to make the firearm operable.